Tham Wooi Loon v Shahul Hamid bin Mohd Ismail

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-22NCvC-170–04 OF 2021
TEE GEOK HOCK JC
29 NOVEMBER 2022

Contract — Agreement — Agreement between plaintiff and defendant — Plaintiff claimed for recovery of money paid to defendant — Whether agreement signed by parties was loan agreement, investment agreement or another type of agreement — Whether defendant's obligation to repay loan had arisen — Whether defendant had breached his obligation under agreement — Whether agreement was illegal

The plaintiff and the defendant had entered into an agreement described as 'loan agreement' ('the agreement'). Under the agreement: (a) the plaintiff agreed to lend the defendant a sum of RM1,125,000 pursuant to the terms of the agreement; (b) the defendant would use the sum solely and exclusively to lend to Reach Energy Holdings Sdn Bhd ('REH') to fund REH's subscription of 15,000,000 ordinary shares and 15,000,000 warrants in Reach Energy Sdn Bhd ('REB'); (c) the defendant being the shareholder and director of REH had undertaken to convene a general meeting and a board of directors meeting expeditiously to ensure the sale of REH's shares and warrants in REB representing 30% of REH's shareholding and warrants in REB within 30 days of the expiry of the moratorium. Moratorium was defined as the prohibition of REH from selling, transferring, assigning or disposing in any way the whole or part of any securities of REB held by REH from the date of listing of REB on the Main Board of the Bursa Malaysia Securities Bhd until REB shall have commenced commercial production and generated one full financial year of audited operating revenue; and (d) the defendant would repay the loan and profits to the plaintiff after the sale of REH's shares and warrants in REB within five business days after the defendant's receipt as shareholder of the defendant's proportion. A general meeting of REH was convened and 50% of shareholding in REB was sold. As the plaintiff had not received any payment towards the repayment of the 'loan', the plaintiff claimed for recovery of the money paid to the defendant. The defendant's defence were that the agreement was allegedly illegal as a moneylending transaction and that the plaintiff's action was premature. The issues for consideration were: (i) whether the agreement signed by the parties was a loan agreement, an investment agreement or another type of agreement; (ii) whether the defendant's obligation to repay the loan had arisen; (iii) whether the defendant had breached his obligation under the agreement; and (iv) whether the agreement was illegal.

Held, allowing the claim with costs:

(1) From the express terms of the agreement, the plaintiff as the fund-provider took the risk of losing the entire money and the risk of getting back less than the original sum of money in his transaction with the defendant. The risks rendered the monetary transaction to be incompatible with a loan simpliciter or a moneylending. Moreover, under the Moneylenders Act 1951 ('the Act'), a one-off monetary transaction with such risks of loss was not moneylending within the meaning of the Act. The absence of fee or brokerage and the fund-recipient defendant's ownership of the REB shares to be bought with the funds provided by the plaintiff rendered the monetary transaction to be incompatible with an investment. Moreover, the defendant had not specifically pleaded nor produced any law or evidence to prove there was anything illegal about such monetary transaction even if it fell within the description of investment. Therefore, the monetary transaction was a hybrid form of loan with elements of business venture, and it was not a moneylending transaction within the meaning of the Act (see paras 30–33).

(2) The obligation to repay the loan by the defendant to the plaintiff had arisen when the moratorium was lifted in 2018 and the REH shares and warrants in REB were sold in 2019 and 2020. Both these events had occurred, and as such the defendant was under an obligation to perform his repayment obligations (see para 36).

(3) The plaintiff had proven that there were at the material times in 2018 and 2019 sufficient distributable retained profits for REH to declare dividends but the defendant had not shown any valid or sufficient reason for not causing REH to declare dividends in 2018 and 2019. At the trial, the defendant had not shown that he had taken any diligent effort or reasonable attempts to cause REH to declare dividends in years 2018 and 2019. The failure of REH to declare dividends in years 2018 and 2019 was caused or at least contributed to by the defendant's default or breach in doing what he could as the then chief executive officer ('CEO') of REH. By not declaring the dividend when he could do so and/or which was within his contractual responsibility, the defendant had breached the terms of the agreement. By breaching the agreement, the defendant was now obliged to repay the principal money of RM1,125,000 to the plaintiff pursuant to the terms of the agreement together with 5.86% of the dividends which could have been declared (see paras 49 & 52–54).

(4) Apart from taking the risks of total loss or partial reduction of the principal money, the plaintiff also take the risk and uncertainty of contingency of repayment being dependent upon the viability and profitability of the business venture of REB and the contingency of declaration of dividends. There was no interest payable on the amount of

principal money provided. The presumption in s 10OA of the Act was not applicable. The defendant had not proven the elements of moneylending. Therefore, the monetary transaction between the plaintiff and the defendant was not an illegal moneylending transaction. The defendant's argument regarding the alleged illegality of the monetary transaction between the plaintiff and the defendant contained in the agreement was rejected (see paras 61–63 & 66–67).

(5) As the plaintiff's witnesses did not testify as to whether and how the two tranches of sale proceeds in 2017 and 2018 could impact on the amount of dividends that could be declared by REH, the amount of the plaintiff's 5.86% dividends was only assessed based on the audited financial statements and the evidence adduced by the witnesses. REH as a company, if it were to be acting under the diligent and reasonable efforts of the defendant as its CEO after the lapse of the moratorium, could have sold its shares in REB in such manner as to be able to declare not less than RM10m as dividends in the second half of 2019 by selling its balance shares in REH and using the sale proceeds to declare as dividends. In the agreement between the plaintiff and the defendant, the defendant was under obligation to pass on to the plaintiff 5.86% of the total dividends of REH, ie 5.86% of RM10m = RM586,000. It was rather conservative to order the defendant to pay the plaintiff the original sum of RM1,125,000 plus the plaintiff's share of dividend of RM586,000. The sum total of the sale proceeds from the sale of the 15,000,000 shares and 15,000,000 warrants in REB in 2019 was very much more than the sum total of these two amounts awarded. The 5% per annum interest on the judgment sum should start from 20 April 2021, the date of filing of the suit (see paras 69–70, 72–74 & 76).

[Bahasa Malaysia summary

Plaintif dan defendan telah menandatangani perjanjian yang disifatkan sebagai 'perjanjian pinjaman' ('perjanjian'). Di bawah perjanjian: (a) plaintif bersetuju untuk meminjamkan defendan sejumlah RM1,125,000 menurut terma perjanjian; (b) defendan akan menggunakan jumlah itu semata-mata dan secara eksklusif untuk memberi pinjaman kepada Reach Energy Holdings Sdn Bhd ('REH') untuk membiayai langganan REH sebanyak 15,000,000 saham biasa dan 15,000,000 jaminan dalam Reach Energy Sdn Bhd ('REB'); (c) defendan sebagai pemegang saham dan pengarah REH telah berjanji untuk mengadakan mesyuarat agung dan mesyuarat lembaga pengarah dengan segera untuk memastikan penjualan saham dan jaminan REH dalam REB yang mewakili 30% daripada pegangan saham dan jaminan REH dalam REB dalam tempoh 30 hari daripada tamat tempoh moratorium. Moratorium ditakrifkan sebagai larangan REH daripada menjual, memindahkan, menyerahkan atau melupuskan dalam apa-apa cara keseluruhan atau sebahagian daripada mana-mana sekuriti REB yang dipegang oleh REH dari tarikh penyenaraian

REB di Papan Utama Bursa Malaysia Securities Bhd sehingga REB memulakan pengeluaran komersial dan menjana satu tahun kewangan penuh hasil operasi teraudit; dan (d) defendan akan membayar balik pinjaman dan keuntungan kepada plaintif selepas penjualan saham dan jaminan REH dalam REB dalam tempoh lima hari perniagaan selepas penerimaan defendan sebagai pemegang saham mengikut kadar defendan. Satu mesyuarat agung REH telah diadakan dan 50% daripada pegangan saham dalam REB telah dijual. Memandangkan plaintif tidak menerima sebarang bayaran untuk pembayaran balik 'pinjaman' tersebut, plaintif menuntut untuk mendapatkan semula wang yang telah dibayar kepada defendan. Pembelaan defendan ialah perjanjian itu didakwa menyalahi undang-undang sebagai transaksi pinjaman wang dan tindakan plaintif adalah pramatang. Isu-isu yang perlu dipertimbangkan adalah: (i) sama ada perjanjian yang ditandatangani oleh pihak-pihak adalah perjanjian pinjaman, perjanjian pelaburan atau sejenis perjanjian lain; (ii) sama ada kewajipan defendan untuk membayar balik pinjaman telah timbul; (iii) sama ada defendan telah melanggar kewajipannya di bawah perjanjian itu; dan (iv) sama ada perjanjian itu menyalahi undang-undang.

Diputuskan, tuntutan dibenarkan dengan kos:

(1) Daripada terma nyata perjanjian itu, plaintif sebagai penyedia dana mengambil risiko kehilangan keseluruhan wang dan risiko mendapat kembali kurang daripada jumlah wang asal dalam transaksinya dengan defendan. Risiko tersebut menyebabkan transaksi kewangan tidak sesuai dengan pinjaman mudah atau pinjaman wang. Selain itu, di bawah Akta Pemberi Pinjam Wang 1951 ('Akta'), transaksi kewangan secara sekali dengan risiko kerugian sedemikian bukanlah pemberian pinjaman wang mengikut pengertian Akta. Ketiadaan fi atau pembrokeran dan pemilikan penerima dana defendan ke atas saham REB yang akan dibeli dengan dana yang disediakan oleh plaintif menyebabkan transakasi kewangan tidak serasi dengan pelaburan. Lebih-lebih lagi, defendan tidak memplid secara khusus atau mengemukakan sebarang undang-undang atau keterangan untuk membuktikan terdapat sesuatu yang menyalahi undang-undang mengenai transaksi kewangan tersebut walaupun ia termasuk dalam perihalan pelaburan. Oleh itu, transaksi kewangan adalah dalam bentuk pinjaman hibrid dengan elemen usaha niaga, dan ia bukan transaksi pinjaman wang dalam pengertian Akta (lihat perenggan 30–33).

(2) Kewajipan untuk membayar balik pinjaman oleh defendan kepada plaintif telah timbul apabila moratorium ditarik balik pada tahun 2018 dan saham REH dan jaminan dalam REB telah dijual pada tahun 2019 dan 2020. Kedua-dua peristiwa ini telah berlaku, dan oleh itu defendan berada di bawah kewajipan untuk melaksanakan kewajipan pembayaran baliknya (lihat perenggan 36).

(3) Plaintif telah membuktikan bahawa pada masa material pada tahun 2018 dan 2019, terdapat keuntungan tertahan boleh diagihkan mencukupi untuk REH mengisytiharkan dividen tetapi defendan tidak menunjukkan sebarang alasan yang sah atau mencukupi untuk tidak menyebabkan REH mengisytiharkan dividen pada 2018 dan 2019. Pada perbicaraan, defendan tidak menunjukkan bahawa dia telah mengambil sebarang usaha atau percubaan munasabah untuk menyebabkan REH mengisytiharkan dividen pada tahun 2018 dan 2019. Kegagalan REH untuk mengisytiharkan dividen pada tahun 2018 dan 2019 adalah disebabkan atau sekurang-kurangnya disumbangkan oleh keingkaran atau pelanggaran defendan dalam melakukan apa yang dia boleh sebagai ketua pegawai eksekutif ('KPE') REH ketika itu. Dengan tidak mengisytiharkan dividen apabila dia boleh berbuat demikian dan/atau yang berada dalam tanggungjawab kontraknya, defendan telah melanggar syarat perjanjian. Dengan melanggar perjanjian, defendan kini bertanggungjawab untuk membayar balik wang prinsipal sebanyak RM1,125,000 kepada plaintif menurut terma perjanjian berserta 5.86% daripada dividen yang boleh diisytiharkan (lihat perenggan 49 & 52–54).

(4) Selain daripada mengambil risiko kehilangan keseluruhan atau pengurangan sebahagian wang prinsipal, plaintif juga mengambil risiko dan ketidakpastian kebarangkalian pembayaran balik yang bergantung kepada daya maju dan keuntungan usaha perniagaan REB dan kebarangkalian pengisytiharan dividen. Tiada faedah yang perlu dibayar ke atas jumlah wang prinsipal yang disediakan. Anggapan dalam s 10OA Akta tidak terpakai. Defendan tidak membuktikan unsur-unsur pinjaman wang. Oleh itu, transaksi kewangan antara plaintif dan defendan bukanlah transaksi pinjaman wang yang menyalahi undang-undang. Hujahan defendan berhubung dakwaan tidak sah transaksi kewangan antara plaintif dan defendan yang terkandung dalam perjanjian telah ditolak (lihat perenggan 61–63 & 66–67).

(5) Memandangkan saksi plaintif tidak memberi keterangan sama ada dan bagaimana dua peringkat hasil jualan pada 2017 dan 2018 boleh memberi kesan kepada jumlah dividen yang boleh diisytiharkan oleh REH, amaun dividen 5.86% plaintif hanya dinilai berdasarkan penyata kewangan yang telah diaudit dan keterangan yang dikemukakan oleh saksi. REH sebagai sebuah syarikat, jika ia bertindak di bawah usaha gigih dan munasabah defendan sebagai KPEnya selepas tamat moratorium, boleh menjual sahamnya dalam REB dengan cara yang boleh mengisytiharkan tidak kurang daripada RM10 juta sebagai dividen pada separuh masa kedua 2019 dengan menjual baki sahamnya dalam REH dan menggunakan hasil jualan untuk diisytiharkan sebagai dividen. Dalam perjanjian antara plaintif dan defendan, defendan mempunyai kewajipan untuk menyampaikan kepada plaintif 5.86%

daripada jumlah dividen REH, iaitu 5.86% daripada RM10m = RM586,000. Adalah konservatif untuk memerintahkan defendan membayar plaintif jumlah asal sebanyak RM1,125,000 ditambah bahagian dividen plaintif sebanyak RM586,000. Jumlah hasil jualan daripada penjualan 15,000,000 saham dan 15,000,000 jaminan dalam REB pada tahun 2019 adalah lebih banyak daripada jumlah keseluruhan kedua-dua amaun yang diberikan ini. Faedah 5% setahun ke atas jumlah penghakiman hendaklah bermula dari 20 April 2021, tarikh pemfailan saman (lihat perenggan 69–70, 72–74 & 76).]

Cases referred to

Edgelow v MacElwee [1918] 1 KB 205, KBD (refd)
Ngui Mui Khin & Anor vS Gillespie Bros & Co Ltd [1980] 2 MLJ 9 ; [1979] 1 LNS 60, FC (refd)

Legislation referred to

Contracts Act 1950 s 40
Moneylenders Act 1900 [UK]
Moneylenders Act 1951 ss 2, 15, 10OA

Iffah bt Yahya (Jayadeep Hari & Jamil) for the plaintiff.
Nurshahira bt Rosli (Noor Amran & Co) for the defendant.

Tee Geok Hock JC:

INTRODUCTION

[1] In our modern economy with numerous monetary transactions, financial and investment products and services, it is at time rather difficult to differentiate between one type of monetary transaction and another type of monetary transaction unless one bears in mind the fundamental nature and distinguishing feature of each type of monetary transaction instead of being carried away by its peripherals or minor terms.

[2] The present case is an example of businessmen using a name to describe a monetary transaction which does not actually reflect the true nature and character of the monetary transaction or for which there is no short name to accurately and completely describe it.

BACKGROUND

[3] The plaintiff's claims are for recovery of money paid to the defendant pursuant to an agreement which related to a business venture of a special purpose acquisition company ('SPAC').

[4] The defendant's defence are that the agreement is allegedly illegal as a moneylending transaction and that the plaintiff's action is premature.

PROCEEDINGS AND FULL TRIAL

[5] Prior to and at the beginning of the full trial, the cause papers filed in the court were marked as follows:

(a) BOP — Bundle of Pleadings (encl 31);

(b) SAF — Statement of Agreed Facts (encl 39);

(c) SIT — Statement of Issues to be Tried (encl 34);

(d) TS — Tabulated Summary (encl 35);

(e) AB1 — Common Bundle of Documents — Part B (encl 32);

(f) AB2 — Common Bundle of Documents — Part B (encl 33);

(g) AB3 — defendant's Additional Common Bundle of Documents Part B (encl 41); and

(h) AB4 — plaintiff's Additional Common Bundle of Documents — Part B (encl 49).

The parties mutually agreed that all the documents in the four bundles AB1 to AB4 are categorised under Part B documents.

In the course of the trial, each party produced its additional bundle of documents and these were agreed as Part B documents and marked as follows:

(i) AB5 — Defendant's Additional Common Bundle of Documents — Part B (encl 50); and

(ii) AB5 — Plaintiff's Additional Common Bundle of Documents — Part B (encl 51).

[6] At the commencement of the full trial, it was also the agreed procedure that:

(a) at the full trial, upon the witness' affirmation and confirmation of the contents of his/her witness statement as his/her evidence, the witness statement and its contents are deemed to be read and there is no necessity for the witness to read the contents of the witness statement into the CRT system. This procedure is without prejudice to the rule against hearsay, ie the principle of evidence which requires witnesses to testify as to facts and matters within their personal knowledge and not on hearsay evidence. Liberty is given to the counsel to ask supplementary or additional

question in examination-in-chief to clarify or explain or highlight salient parts of the witness statement before the cross-examination begins; and

(b) in order to save time and costs at the full trial, the Part A and Part B documents referred to in the witnesses' statements and evidence are marked as per the marking of agreed bundles of documents as 'AA' and 'AB' numbers respectively followed by the page numbers and there is no necessity to mark the relevant pages of the Part A and Part B documents with separate exhibit numbers again. However, this procedure shall be without prejudice to the rule against hearsay. Part C document, when either upgraded into Part B document or its original have been tendered by the maker and verified as authentic, shall be marked with a separate exhibit number.

[7] At the full trial which went on for three days, the plaintiff called three witnesses and the defendant himself was the sole witness for the defendant. The witnesses who testified at the full trial were as follows:

Witness	Date of giving oral evidence	Witness statement
PW1 Tham Jooi Loon	1 August 2022	encl 39; Signed copy marked as 'WS-PW1'
PW2 Nurul Ain bt Abdul Latif	2 August 2022	Subpoenaed witness
PW3 Tham Wooi Loon	2 August 2022	encl 40; Signed copy marked as 'WS-PW3'
DW1 Shahul Hamid bin Mohd Ismail	11 August 2022	encl 42; Signed copy marked as 'WS-DW1'

[8] After the full trial and closing submissions, this court on 20 October 2022 allowed the plaintiff's claims with costs.

[9] Dissatisfied with the said decision, the defendant has filed an appeal to the Court of Appeal.

THE AGREEMENT

[10] The plaintiff and the defendant had entered into an agreement described as 'loan agreement' dated 15 January 2014 (hereinafter referred to as 'the said agreement') (encl 32, AB1/4–15; SAF para 2). This fact is not in dispute between the parties here. It is also undisputed that a true copy of the said agreement is found in AB1/4–15.

[11] Under cl 1.01 and 3.01 the plaintiff agrees to lend the defendant a sum

of RM1,125,000 pursuant to the terms of the said agreement (see SAF para 3, AB1/5–6).

[12] The salient terms of the said agreement, using the same descriptions as were used in the said agreement, are:

(a) that the plaintiff would lend the defendant a sum of RM1,125,000 (see cll 1.01 and 3.01 in AB1/5, 6; SAF para 3 (encl 29);

(b) that the defendant would use the said sum solely and exclusively to lend to REACH ENERGY HOLDINGS SDN BHD ('REH') to fund REH's subscription of 15,000,000 ordinary shares and 15,000,000 warrants in REACH ENERGY SDN BHD ('REB'); (cl 3.02 in AB1/6 in encl 32; SAF para 3 (encl 29);

(c) that the defendant being the shareholder and director of REH had undertaken to convene a general meeting and a board of directors meeting expeditiously to ensure the sale of REH's shares and warrants in REB representing 30% of REH's shareholding and warrants in REB within 30 days of the expiry of the moratorium; (cl 6.02(a)) (see AB1/7 in encl 32);

(d) moratorium is defined as the prohibition of REH from selling, transferring, assigning or disposing in any way the whole or part of any securities of REB held by REH from the date of listing of REB on the Main Board of the Bursa Malaysia Securities Bhd until REB shall have commenced commercial production and generated one full financial year of audited operating revenue; (cl 2.01) (see AB1/5 in encl 32);

(e) that the defendant will repay the loan and profits to the plaintiff after the sale of REH's shares and warrants in REB as stated above; (cl 6.01) (see AB1/7–8 in encl 32); and

(f) that the defendant will repay to the plaintiff the loan amount and profits within five business days after the defendant's receipt as shareholder of the defendant's proportion of the aforesaid dividends pursuant to the sale as stated in cl 6.02 above (cl 6.02A) (see AB1/8 in encl 32).

[13] As the plaintiff had not received any payment towards the repayment of the 'loan', the plaintiff had demanded the said sum via its solicitors.

[14] The defendant through its solicitor's letter dated 30 November 2020 acknowledged the convening of a General Meeting of REH on 24 August 2018. The defendant further confirmed that 50% of shareholding in REB was sold (see p 17 Bundle AB1 (encl 32); SAF para 4 (encl 29).

[15] The following facts are not in dispute: (a) a sum of RM1,125,000 was

given by the plaintiff to the defendant; (b) that both the plaintiff and the defendant have signed the agreement referred to above; (c) that dividends were not declared by REH; and (d) the defendant has not repaid any money to the plaintiff.

ISSUES

[16] The dispute in summary centres around the following broad issues:

(a) was the agreement signed by the parties a loan agreement, an investment agreement or another type of agreement?

(b) has the obligation to repay the monies by the defendant under the agreement arisen?

(c) has the defendant breached the above obligation to repay the monies? and

(d) is the agreement an illegal moneylending transaction?

NATURE OF THE AGREEMENT

[17] In the present case, the plaintiff argues that the said agreement is a loan agreement and the money which the plaintiff provided to the defendant is a friendly loan.

[18] On the other hand, the defendant argues that it is an investment agreement, an illegal moneylending transaction and/or that the plaintiff's claim is premature.

[19] In arguing that the signed agreement is a loan agreement, the plaintiff submits that there are terms in the agreement which describes it as a 'loan agreement' and the money as 'loan':

(a) the agreement is intituled 'loan agreement';

(b) cl 1.01 of the agreement states that the lender/plaintiff is agreeable to grant the borrower/defendant a loan (see AB1/5 (encl 32);

(c) cl 2.01 of the agreement defines what the loan is (see AB1/5 (encl 32);

(d) cl 3.01 of the agreement clearly states that the lender/plaintiff grants a loan to the borrower/defendant (see AB1/6 (encl 32);

(e) cl 3.02 of the agreement clearly talks about the purpose of the loan (see AB1/7 (encl 32); and

(f) the clauses on repayment of the loan also refers to the monies being a loan (see AB1/7–8 (encl 32).

[20] Further, the plaintiff submits that the defendant has acknowledged at various stages that this was a loan:

(a) he has acknowledged during cross examinations that the terms in the agreement refer to a loan (see: pp 12–15 notes of proceedings for 11 August 2022);

(b) at p 621 Bundle AB2 (encl 33) it is clear from the defendant's email that the monies due to the defendant were coming from about 20 employees:

(i) the defendant did not want to enter into an agreement with 20 different persons;

(1) so, he suggested that the 20 persons sign an 'Investment Agreement' amongst themselves;

(2) and then one person either the plaintiff or Nathan Tham (PW1) would become the loaning party (Emphasis added.); and

(3) the defendant also acknowledges it during cross examination at p 48 notes of proceedings for 11 August 2022

(ii) at p 622 Bundle AB2 (encl 33) also reference was made to a loan agreement and the defendant did not dispute it;

(1) at p 623 Bundle AB2 (encl 33) also reference was made to a loan agreement and the defendant did not dispute it;

(2) at p 624 Bundle AB2 (encl 33) also reference was made to a loan agreement and the defendant did not dispute it;

(3) Q33 SWS-D1 (defendant witness statement) — in that question the defendant has also acknowledged that the agreement is a loan agreement;

(4) Q34 SWS-D1 (defendant witness statement) — the defendant here acknowledges he has to repay the sum of RM,125,000; and

(5) the defendant only states in Q35 that his obligation only arises if dividends are declared.

[21] In arguing that the money provided to him was an illegal moneylending transaction, the defendant submits that 'The lender's profit on the loan equal to 5.86% of the dividends less other charges attributable to and proportionate to the loan arising from such sale' in cl 6.02A of the agreement is an interest in disguise.

[22] In ascertaining the true nature of the monetary transaction, the court does not merely look at the cover or face of the terms in the agreement alone

but also consider the context and factual matrix under which the subject money was provided by one party to the other party, the purpose of the money, the terms of repayment, and circumstances leading to the obligation to repay or to account for the proceeds.

[23] In our present case, the relevant terms for this purpose include the following clauses of the agreement:

> 6.01 Repayment : Subject to *Clause 6.03*, the borrower hereby agrees to repay to the Lender, the following:
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> (a) the principal amount of the Loan; and
>
> (b) profit on the Loan referred to in *Clauses 6.02A and Clauses 6.02B*; in the manner set out in *Clause 6.02A and Clause 6.02B*. For the avoidance of doubt, no monies shall be payable by the borrower to the Lender for the REB shares subscribed with the Loan and the borrower's obligations are just to repay an amount equivalent to the principal amount of the Loan and the abovementioned profit on the Loan. *The REB shares subscribed with the Loan is owned by the borrower*.
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> *6.02A Payment after sale in Clause 6.02(a):* Within 5 Business Days after the borrower's receipt as shareholder of his proportion of the aforesaid dividends in relation to the sale of the REB shares, Warrants and/or new REB shares on Exercise of Warrants in *Clause 6.02(a)*, the borrower shall effect payment and repayment to the Lender of the following amounts:
>
> (i) principal sum of the Loan, ie RM1,125,000 only; and
>
> (ii) the Lender's profit on the Loan equal to *5.86%* of the aforesaid dividends less other charges attributable and proportionate to the Loan arising from such sale.
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> The aforesaid payment shall be made in accordance with the Lender's written directions. For the avoidance of doubt, *the obligation of the borrower to pay as abovementioned is subject to his receipt of the aforesaid dividends and the dividends when paid as abovementioned shall be payment for both the principal sum of the Loan and the aforementioned profit.*
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> *6.2 B Payment after sale in Clause 6.02(b):* The borrower shall sell an agreed portion of his shareholdings in REH to certain other shareholders of REH, namely Abd Rahim bin Shamsudin, Dr. Robert King Park, Syed Salim bin Syed Abu Bakar and Ronald Lee Schakosky ('purchasing shareholders') within a reasonable period after each sale of the REB shares, Warrants and/or new REB shares on Exercise of Warrants in *Clause 6.02(b)*. The borrower shall procure that the purchasing shareholders shall pay for their purchase of the REH shares from the borrower using an adequate amount of the dividends received by them in relation to the sale set out in *Clause 6.02(b)*. Within 5 Business Days after the borrower's receipt of the proceeds of sale from the purchasing shareholders, the borrower shall effect payment to the Lender (in accordance with the Lender's written directions) of the Lender's profit on the Loan equal to *5.86%* of the aforesaid proceeds of sale less other charges attributable to and proportionate to the Loan arising from such sale.

For the avoidance of doubt, *the obligation of the borrower to pay as abovementioned is subject to his receipt of the aforesaid dividends.*

6.3 Non-Listing of REB: If the listing of and quotation for the securities of REB on the Main Board of the Bursa Malaysia Securities Berhad as a special purpose acquisition company is aborted, rejected or kept in abeyance for a period exceeding 12 months (including the time taken for appeal), cancelled or not carried out or not implemented for any reasons whatsoever, the borrower shall repay the principal sum of the Loan, ie, *RM1,125,000 only less 5.86% of all operating costs and expenses incurred and accounted for by REH and REB* within 15 Business Days after the borrower's receipt of a written demand from the Lender or within such other timeframe as shall be mutually agreed between the parties.

6.4 Non-Completion of Qualifying Acquisition: if the qualifying acquisition intended to be undertaken by REB is not completed in accordance with the Equity Guidelines issued by Securities Commission resulting in the liquidation of REB, *there shall be no repayment of the Principal Sum of the Loan to the Lender*. (Emphasis added.) See pp 7 to 9 of AB1.

[24] In essence, a loan is a monetary transaction whereby the lender provides a specific sum of money to the borrower in consideration of the borrower's promise to repay the said sum of money either with interest or without interest thereon. A lender does not take any risk of loss of the loan money or any risk of reduction in principal amount of loan money, and the borrower has to repay the lender at least the original amount of loan money irrespective of what happened to the loan money after it has been utilised by the borrower.

[25] The essence of an investment *simpliciter* is a monetary transaction whereby an investor provides a specific sum of money to the investment manager or business promoter whereby the money is to be used for the purpose of investing in an asset or business venture in consideration of the promise, for a fee or brokerage payable to the investment manager or business promoter, of the manager or promoter to repay the investment proceeds which may be more (if the investment turns out to be profitable) or less (if the investment turns out to be a loss) than the original sum provided. A key feature of an investment *simpliciter* is that the investment manager or business promoter operates or manages an investment account on behalf of or in trust for the investor in return for a brokerage or management fee. In such simple investment, the investor enjoys profit or takes risk of loss from the investment and the investment manager or business promoter collects his brokerage or management fee but does not guarantee that the investor will get back at least the original principal sum.

[26] There may be cases of guaranteed investment whereby the investment manager or business promoter promises either an investment return of the

original sum plus a rate of profit or the minimal return of the original sum.

[27] Apart from these, there may be monetary transactions whereby a group of people pool their monies together and provide the monies to a business promoter to use them in a new business venture wherein the business promoter also put some of his money in the same pool but does not promise any profit or any minimal return. The business promoter agrees to pass on the returns from the business venture, be it more or less than the original sums of monies, to the fund-providers at some future point of time in the business venture. This type of transaction is generally described as business venture. A key feature of a business venture is that the business promoter owns and manages the business on his own account and he does not hold his shares or ownership in the business in trust or on behalf of the fund-providers, nor does he operate or manage any monetary account on behalf of the fund-providers.

[28] In our present case, the money provided by the plaintiff to the defendant was for solely and exclusively to lend to REACH ENERGY HOLDINGS SDN BHD (REH) to fund REH's subscription of 15,000,000 ordinary shares and 15,000,000 warrants in REACH ENERGY SDN BHD (REB): (cl 3.02) (see AB1/6 (encl 32). REB was to be listed as a special purpose acquisition company ('SPAC') on the stock exchange of Bursa Malaysia. The funds provided by the plaintiff to the defendant were pooled together by many employees of Daya Materials, where the plaintiff worked and the defendant also previously worked: oral evidence of PW1 Tham Jooi Loon on 1 August 2022. The defendant also put some of his money in the same pool for the same purposes: oral evidence of PW1 Tham Jooi Loon on 1 August 2022 and oral evidence of the defendant DW1 on 11 August 2022. As the Managing Director of the SPAC, the defendant would spearhead the investment by causing the SPAC to acquire oil and gas concession rights overseas and to develop the oil and gas business. When cross-examined on 11 August 2022 the defendant DW1 Shahul Hamid regarding the contents of his email dated 9 April 2013 to PW1 Tham Jooi Loon (Nathan Tham), the defendant confirmed that they were 20 persons who pooled their funds together under one person and provided the pooled funds to him for the SPAC business.

[29] In his oral evidence on 1 August 2022 PW1 Tham Jooi Loon testified that SPAC was a recently-recognised framework for a company to raise big capital when the company has no business yet and no track record or profit yet. Before REB, there were approximately two other SPACs listed on Bursa Malaysia, and REB was probably the largest SPAC then. The main requirement of SPAC is quality management team. Daya Materials, from its downstream businesses with experience there, wanted to go upstream. The defendant, then an employee of Daya Materials, had upstream experience and he was chosen by Daya Materials team to spearhead the SPAC. The plaintiff's team and also the

defendant's team came up with the initial pool of finance for the SPAC. The first round of pooling financial resources was in 2013 and 2014. With the capital provided by REH from the pooling of finance from the plaintiff's team and the defendant's team, REB proceeded to apply for and obtain the approval for public listing. REB, upon public listing, raised RM750m in addition to REH's capital. It is the regulatory authority's requirement that the funds be used to acquire a qualifying asset within three years, failing which there would be liquidation of the SPAC resulting in a loss to the fund-providers. In 2017 REB acquired a qualifying asset, namely upstream oilfields in Khazakstan. After the acquisition of the qualifying asset, REB obtained the regulatory authority's approval and also the approval of more than 75% of the shareholders of REB, and REB continued to carry on its businesses. There was a moratorium imposed on the promoters but not on the other shareholders. The moratorium was until one year after the first audited revenue. Although the promoters have to wait until the expiry of the moratorium before trading the REB shares, the other shareholders who are not promoters can freely trade the REB shares and warrants anytime after the public listing of REB shares.

[30] From the express terms of the said agreement, the plaintiff as the fund-provider took the following *risks* in his transaction with the defendant:

(a) the *risk of losing the entire money* if the qualifying acquisition intended to be undertaken by REB is not completed thereby resulting in the liquidation of REB, as in such event 'there shall be no repayment of the Principal Sum of the Loan to the Lender' (see cl 6.04 of the said agreement at AB1/8–9); and

(b) the *risk of getting back less than the original sum of money* in the event that the SPAC's proposed acquisition of oil and gas venture business is unsuccessful or in the event REB is not listed on the Main Board of Bursa Malaysia within 12 months, in which event the plaintiff would be repaid the principal amount *less* 5.86% of all operating costs and expenses of REB and REH (see cl 6.03 of the said agreement at *AB1/8*).

Also, under the said agreement the plaintiff stood the *opportunity to enjoy the profit* if the share value of the SPAC appreciates in the event that the SPAC's proposed acquisition of oil and gas venture business is successful and REB is successful in listing its shares on Bursa Malaysia Main Board (see cll 6.02A and 6.02B of the said agreement at *AB1/8*). Clause 6.01 of the said agreement contained a stipulation that *the REB shares subscribed with the money provided by the plaintiff is owned by the defendant*: see AB1/7.

[31] The *risk of losing the entire money* (if the qualifying acquisition intended to be undertaken by REB is not completed thereby resulting in the liquidation of REB) and the *risk of getting back less than the original sum of money* (in the

event that the SPAC's proposed acquisition of oil and gas venture business is unsuccessful or in the event REB is not listed on the Main Board of Bursa Malaysia within 12 months) render the monetary transaction to be incompatible with a loan simpliciter or a moneylending. Moreover, under the Moneylenders Act , a one-off monetary transaction with such risks of loss is not moneylending within the meaning of the Act.

[32] The absence of fee or brokerage and the fund-recipient defendant's ownership of the REB shares to be bought with the funds provided by the plaintiff render the monetary transaction to be incompatible with an investment. Moreover, the defendant has not specifically pleaded nor produced any law or evidence to prove there was anything illegal about such monetary transaction even if it falls within the description of investment.

[33] In the entire circumstances this court finds that the monetary transaction in our present case is a hybrid form of loan with elements of business venture, and it is not a moneylending transaction within the meaning of Moneylending Act as such.

WHETHER THE DEFENDANT'S OBLIGATION TO REPAY THE LOAN HAS ARISEN

[34] The express terms of the agreement stipulate for the repayment of money by the defendant to the plaintiff:

(a) the loan is to be repaid following the provisions of cl 6.01 which refers to 6.02A and 6.02B (AB1 pp 7–8);

(b) under cl 6.02 once the moratorium expires, the defendant is supposed to sell up to 30% of REH's shares and warrants in REB within 30 days of the moratorium expiring;

(c) the first moratorium expired sometime in November 2018 (AB5/1 in encl 50; see evidence of PW1 Tham Jooi Loon; this was admitted by DW1 Shahul Hamid in cross-examination on 11 August 2022). The moratorium for the second tranche of 187m shares in REB was lifted in November 2019, admitted by DW1 Shahul Hamid in cross-examination on 11 August 2022;

(d) which would mean that within 30 days of that November 2018 date, the defendant should have caused REH to sell 30% of its shares and warrants in REB;

(e) REH sold significant quantities of its shares and warrants in REB, as evidenced at Q8 WS-PW1 (PW1 Tham Jooi Loon's witness statement and evidence on 1 August 2022) and in Q8 WS-PW3 (PW3 Tham Wei Loon's witness statement and evidence on 2 August 2022). PW1's search

reports from Bursa Malaysia's official website have been produced as AB1/18 to 34 and tabulated in Q&A 8 of WS-PW1. These search reports show that between 19 February 2019 and 10 April 2019 REH disposed of 120m warrants in REB for a total consideration of RM6,733,000 and between 11 April 2019 and 12 June 2019 REH disposed of its 127,800,000 shares in REB for a total consideration of RM32,277,021.50. In 2020 a total of 130.7 million warrants in REB were disposed of by REH for RM653,000. See also announcements to Bursa Malaysia in AB1/35-45. The disposal price per share plus warrant was RM0.30 per share as compared with the original cost of RM0.075 per share, thereby rendering REH to enjoy a gain on disposal: WS-PW1 Q&A9 and PW1 Tham Jooi Loon's evidence on 1 August 2022. This evidence is not disputed and not challenged as well. These sales and warrants were sold by REH at times when the defendant was one of the only two;

(f) Directors of REH: see the audited financial statements of REH in AB3 (encl 43);

(g) without the consent or approval of the defendant as one of the two Directors in REH, REH could not have implemented the sale of tis shares and warrants in REB. In the circumstances, the defendant has caused the sale by REH of its shares and warrants in REB;

(h) the contemporaneous documentary evidence of REH's sales of its shares and warrants in REB is found at AB1/18 -45 (encl 32); also evidence of PW1 Tham Jooi Loon on 1 August 2022; and

(i) REH received the proceeds of sale from the sale of its shares and warrants in REB (evidence of PW1 Tham Jooi Loon on 1 August 2022).

[35] Under cl 6.02(c) of the loan agreement, the defendant had undertaken to cause REH to declare and pay the maximum amount of dividends to the defendant and other shareholders of REH. REB, the SPAC, was listed on the Main Market of Bursa Malaysia on 15 August 2014 (see AB3/46; evidence of PW1 Tham Jooi Loon on 1 August 2022).

[36] From the evidence above, it is clear that the obligation to repay the loan by the defendant to the plaintiff has arisen when the moratorium is lifted in 2018 and the REH shares and warrants in REB are sold in 2019 and 2020. In our present case, both these events have occurred, and as such the defendant is under an obligation to perform his repayment obligations.

WHETHER THE DEFENDANT HAS BREACHED HIS OBLIGATION UNDER THE AGREEMENT

[37] In the statement of claim at p 32 Bundle BOP (encl 31) the plaintiff pleaded that the particulars of breach by the defendant are:

(a) failure to repay the loan despite dividends being declared; and

(b) in the alternative if the dividends were not declared then the failure to cause the declaration of dividends in REH when dividends could have been declared.

[38] At the trial, it is not disputed that dividends were not declared by REH even until the date of the trial. It is undisputed that the moratorium were lifted in two tranches, the first tranche in November 2018 and the second tranche in November 2019: see AB5/1–2 (encl 50); evidence of the defendant DW1 in cross-examination on 11 August 2022.

[39] Under cl 6.02(a)–(c) of the said agreement the defendant has undertaken to convene a general meeting and a board of directors meeting expeditiously and further undertakes to vote in favour: '(c) the declaration and payment of the maximum amount of dividends (as permitted by law) by REH to its shareholders from the proceeds of sale of the REB shares ...' (AB1/7–8).

[40] The meeting was convened by REH (see AB1/190–199 (encl 32). The resolution of the REH meeting, pursuant to the lifting of the moratorium, authorised the sale and disposal of the shares in REB, utilisation of the sale proceeds to meet the commitments of REH and utilisation of the balance proceeds. Omitted from the resolution of REH was the fulfilment of the defendant's commitments to the plaintiff. This resolution was approved and signed by the defendant himself as the Chairman of the meeting: see AB1/193–195.

[41] From the financial statement of REH that in 2019, there was some profit available for dividend distribution. This is evident from the following pages of the financial statement:

(a) AB3/91 (encl 43) where it was recorded that as at 31 July 2019 there was RM12,747,525 available to be distributed;

(b) PW2 Nurul Ain, the witness from Price Waterhouse Coopers, has testified that distributable retained profits, which PW2 has stated unequivocally that distributable retained profits, can be distributed as dividends (see p 12 notes of proceedings for 2 August 2022); and

(c) the defendant DW1 too has admitted that if a company has distributable retained profits, then dividends can be declared [p 30 notes of proceedings for 11 August 2022).

[42] It is clear that in 2019, which is after the moratorium was lifted, the defendant could have caused the dividends to be declared but he did not.

[43] In the evidence of the defendant DW1 in the notes of proceedings under cross examination at pp 16–25 notes of proceedings for 11 August 2022). There the defendant admitted that:

(a) he had given an undertaking to convene a meeting — which he did; and

(b) he then acknowledged that he is supposed to sell the shares and warrants that REH owns in REB.

[44] There were only two directors at REH at the material times, the defendant and one Azmi Arshad (see financial statement of REH for year ending 31 July 2019 in AB3/88). Without the defendant's approval or consent, the REH Board of Directors at the material times in 2019 until March 2020 could not have distributed or disposed of the profits of REH to any other person. In the circumstances, at the material times, it was within the power of the defendant to control and/or handle the Board of Directors in REH so that REH would conduct its affairs in such a way as not to result in the defendant's breach of the agreement with the plaintiff.

[45] From the evidence it can be seen that:

(a) after the moratorium was lifted in 2018, the shares and warrants were sold in 2019 and 2020;

(b) dividends were not declared although there was distributable retained profits to be declared as dividends as at July 2019 which amount to RM12,747,525 (AB3/90). At the same time, the value of 'Investment in associate' ie REB as at 31 July 2019 was RM39,608,752, and the 'Cash and bank balance' was RM307,421;

(c) the defendant in cross examination said dividends could not be declared because there were commitments to the five sellers of the shares by REH. Please see p 42 notes of proceedings for 11 August 2022 where clearly the defendant has said the retained profits would go to the five parties;

(d) from AB3/102 (encl 43) the amounts due to the five parties only amounted to about RM7,807,957 as at 31 July 2019 (see item 12 PAYABLES AND ACCRUALS). As compared with the 2018 amount of 'Amount due to nominee shareholders' of RM39,113,023 in year ending

31 July 2018, this shows that during the year between 31 July 2018 and 31 July 2019, REH has repaid about RM31m to the five parties described as nominee shareholders;

(e) from the audited financial statement in AB3/102, it can be concluded that the defendant caused or facilitated the REH Board of Directors to repay about RM31m to the other five parties but did not repay anything to the plaintiff;

(f) so even if one were to accept the defendant's argument, there was still balance shares in REB which were held by REH and which was within the power of the defendant to sell and turn into cash and then cause REH to repay to the plaintiff in respect of the plaintiff original RM1,125,000;

(g) as at the material times in 2019, there was enough REB shares worth RM39,608,752 (AB3/90) to be sold or disposed of to cover the repayment obligations of REH including 'Payables and Accrual' and 'Advances from shareholders' totalling RM26,168,648 (AB3/90 and AB3/103) and from which the defendant could use part thereof to repay the plaintiff's RM1,125,000. The defendant has not given a cogent reason for not doing so in order to repay the plaintiff; and

(h) the defendant has also not explained why REH, whose only business was investment holding company with shares in REB and advances and monies injected in or before 2016 from various persons including the plaintiff and the defendant and with no bank borrowing, could have incurred huge finance expense of more than RM5m in 2018 and 2019 when there was no finance expense in 2016 and very small amount of finance expense in 2017: see the following tabulated summary:

Year ending 31 July	Amount of finance expense (RM)	Documentary evidence
2016	(92)	AB3/45
2017	742,275	AB3/45, 62
2018	6,253,429	AB3/62, 92
2019	5,769,024	AB3/92

[46] The key items of financials of REH summarised from the audited financial statements of REH for financial years ending 31 July 2014 until year ending 31 July 2018 are tabulated below:

YE 31 July	2015	2016	2017	2018	2019
Assets (A):					
Value of investment in associate	155,916,122 (AB3/8)	173,808,136 (AB3/8)	153,094,386 (AB3/35, 46)	84,994,858 (AB3/63)	39,608,752 (AB3/90)

YE 31 July	2015	2016	2017	2018	2019
Liabilities (L):					
L1: Payables & Accruals	70,793 (AB3/35)	85,824 (AB3/35)	45,134,939 (AB3/35)	40,229,584 (AB3/63)	7,998,646 (AB3/90)
L2: Share holders advance	18,170,002 (AB3/8)	18,170,002 (AB3/8)	18,170,002 (AB3/35)	18,170,002 (AB3/63)	18,170,002 (AB3/90)
L3: Amount due to nominee share holders	—	—	44,808,250 (AB3/47]	39,113,023 (AB3/75)	7,807,957 (AB3/102)
Total Liabilities	18,240,830	18,255,847	63,304,941	58,399,586	26,168,648
	(AB3/8)	(AB3/8)	(AB3/35, 48)*	(AB3/76)	(AB3/90)
Expenses (E):					
E1: admin & miscel	18,353 (AB3/10)	15,490 (AB3/10)	150,040 (AB3/45)	1,291,255 (AB3/63)	598,204 (AB3/100)
E2: Finance expense	(183) (AB3/10)	(92) (AB3/10)	742,275 (AB3/45)	6,253,429 (AB3/63)	5,773,774 (AB3/100)
Retained profits	136,701,996 (AB3/23)	154,563,503 (AB3/49)	88,890,972 (AB3/35)	25,695,587 (AB3/63)	12,747,525 (AB3/90)

[47] From the tabulated summary in the immediately foregoing paragraph and the audited financial statements referred to therein, the following points can be noted:

(a) as at 31 June 2016, REH owned 20% of shares in REB, the SPAC: AB3/20. The fair market value of the REB shares and warrants which REH held as at 31 July 2016 was RM173,808,136: AB3/8. As at 31 July 2016 the total paid-up share capital of REH was RM1,000,000 and its total shareholders advances was RM18,170,002 and its total liabilities was RM18,255,847 (AB3/8);

(b) during the financial year ending 31 July 2017, REH bought 73,403,100 of ordinary shares in REB for an agreed range of purchase consideration per share: AB3/46;

(c) during the financial year ending 31 July 2017: REH sold 25,350,000 of shares in REB (AB3/74). The defendant, as CEO of REH at the material times, has not disclosed to this court what was the total amount of sale proceeds from the first tranche of shares sold during the financial year ending 31 July 2017 or what has happened to the sale proceeds;

(d) during the financial year ending 31 July 2018: REH sold 40,650,000 shares in REB (AB3/74). The defendant, as CEO of REH at the material times, has not disclosed to this court what was the total amount of sale proceeds from the second tranche of shares sold during the financial year ending 31 July 2018 or what has happened to the sale proceeds; and

(e) during the financial year ending 31 July 2019: REH sold 127,800,100 units of shares and 125,000,000 units of warrants in the associate REB for considerations of RM31,777,022 and RM7,033,000 respectively, resulting in the shareholding reducing to 12.33% (2018: 24.7%). (AB3/101). It was only after collection of sale proceeds from the tranche of shares and warrants sold during the financial year ending 31 July 2019 that the sale proceeds were used to repay the five nominee shareholders for the 73,403,100 of ordinary shares in REB which REH bought from the nominee shareholders.

There is no explanation or accounting from the defendant as to how and where the sale proceeds of the first tranche of sale shares (25,350,000 units) and the second tranche of sale shares (40,650,000) were utilised.

[48] From the abovementioned tabulated summary, it can be seen that despite the sales of the first tranche of sale shares (25,350,000 units) and the second tranche of sale shares (40,650,000) in the two previous financial years, the shareholders advances totalling RM18,170,002 has not been repaid at all and the amount due to nominee shareholders totalling RM44,808,250 was only repaid by about RM5.5m. The defendant has also failed to explained why REH, as an investment holding company, had to purportedly incur finance expenses in excess of RM5m per year as from financial year ending 31 July 2018 onwards when the audited financial statements do not show any new financial investment apart from the purchase of 73,403,100 REB shares from nominee shareholders in 2017. When cross-examined on 11 August 2022 as to why REH as an investment holding company with no office or staff could have alleged operating expenses of more than RM1m a year, the defendant DW1 merely answered 'I don't know'.

[49] In the circumstances of the present case, the plaintiff has proven that there were at the material times in 2018 and 2019 sufficient distributable retained profits for REH to declare dividends but the defendant has not shown any valid or sufficient reason for not causing REH to declare dividends in 2018

and 2019. At the trial, the defendant has not shown that he had taken any diligent effort or reasonable attempts to cause REH to declare dividends in years 2018 and 2019. PW2 Nurul Ain, an independent professional auditor, has testified categorically in her evidence in re-examination on 2 August 2022 that in year 2019 there was an amount of distributable retained profit of RM12,747,525, subject to requirements of the Companies Act, in AB3/91 (encl 43). This court finds PW2 Nurul Ain to be a credible and independent witness here.

[50] Clause 6.02B of the said agreement provides that 'The borrower shall sell an agreed portion of his shareholdings in REH to certain other shareholders of REH, namely Abd Rahim bin Shamsudin, Dr. Robert King Park, Syed Salim bin Syed Abu Bakar and Ronald Lee Schakosky ('*purchasing shareholders*') within a reasonable period after each sale of the REB shares, warrants and/or new REB shares on exercise of warrants in *cl 6.02(b)*. The borrower shall procure that the purchasing shareholders shall pay for their purchase of the REH shares from the borrower using an adequate amount of the dividends received by them in relation to the sale set out in *cl 6.02(b)*. Within five business days after the borrower's receipt of the proceeds of sale from the purchasing shareholders, the borrower shall effect payment to the lender (in accordance with the lender's written directions) of the lender's profit on the loan equal to *5.86%* of the aforesaid proceeds of sale less other charges attributable to and proportionate to the loan arising from such sale'. Read together with other terms of and in the context of the said agreement, the intent of the contracting parties in the said agreement was that REH should turn its REB shares and warrants into cash by selling its REB shares and warrants and then from the sale proceeds and distributable profits declare dividends and distribute them to the fund-providers including the plaintiff. Instead of doing as stipulated in the said agreement, the audited financial statements show that REH bought millions of additional REB shares from nominee shareholders at a price of RM0.75 per share, agreed to pay the sellers 15%pa interest on the deferment of price payment and in the process mopped up the cash which REH received from the sale proceeds of REB shares and warrant which REH subsequently sold at an average price of about RM0.30 per share. An example of such share purchase agreement with a nominee shareholder can be found in AB6 (encl 51).

[51] Buying shares from the nominee shareholders (as was done by REH) instead of selling shares to them (as was stipulated in caluse 6.02B of the said agreement) were the opposite to each other. In allowing or approving the buying of REB shares from the nominee shareholders, the defendant acted contrary to the intent of the said agreement which he signed with the plaintiff.

[52] In our present case, the failure of REH to declare dividends in years

2018 and 2019 was caused or at least contributed to by the defendant's default or breach in doing what he could as the then CEO of REH. Where the contract imposes a payment obligation on a party upon the occurrence of an event and such event is within the control or under the responsibility of the party, the party cannot rely on his own default or breach as a valid ground for refusing to make payment by reason of the non-occurrence of the event. A party who has disabled himself from performing his part of the contract is treated as having committed a repudiatory breach of contract, as is the result flowing from s 40 of the Contracts Act 1950 which provides as follows:

> 40 Effect of refusal of party to perform promise wholly
>
> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.
>
> ILLUSTRATIONS
>
> (a) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her $100 for each night's performance. On the sixth night A wilfully absents herself from the theatre. B is at liberty to put an end to the contract.
>
> (b) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her at the rate of $100 for each night. On the sixth night A wilfully absents herself. With the assent of B, A sings on the seventh night. B has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through A's failure to sing on the sixth night.

[53] By not declaring the dividend when he could do so and/or which was within his contractual responsibility, the defendant has breached the terms of the agreement.

[54] By breaching the agreement, the defendant is now obliged to repay the principal money of RM1,125,000 to the plaintiff pursuant to the terms of the agreement together with 5.86% of the dividends which could have been declared.

WHETHER THE AGREEMENT IS ILLEGAL

[55] The defendant has pleaded that the said agreement is illegal because it contravenes the Moneylenders Act 1951.

[56] In the paragraphs above, this court has fund that this is a hybrid of loan coupled with elements of business venture as it involves a risk of total loss and risk of reduction in principal amount, as contrasted with loan transaction

where the lender does not bear any risk of loss or reduction whatsoever.

[57] Under the Moneylenders Act, a loan becomes a moneylending if the loan is given by a moneylender and it carries an interest (s 2 definition). Section 15 provides that 'No moneylending agreement in respect of money lent after the coming into force of this Act by an unlicensed moneylender shall be enforceable'. Section 2 of the Moneylenders Act has these definitions:

> 'moneylender' means any person who carries on or advertises or announces himself or holds himself out in any way as carrying on the business of moneylending, whether or not he carries on any other business;
>
> 'moneylending' means the lending of money at interest, with or without security, by a moneylender to a borrower;
>
> 'moneylending agreement' means an agreement made in writing between a moneylender and a borrower for the repayment, in lump sum or instalments, of money borrowed by the borrower from the moneylender;

[58] Under the Moneylenders Act, there must be some degree of continuity of lending or holding oneself out as moneylender before a lender becomes a moneylender. An isolated instance of friendly loan is not moneylending. This requirement is explained in s 2 and in the decided cases including those stated below:

(a) in s 2 of the Moneylenders Act 1951 , 'moneylending' is defined to mean 'the lending of money *at interest*, with or without security, by a moneylender to a borrower' and 'moneylender' is defined *to mean any person who carries on or advertises or announces himself or holds himself out in any way as carrying on the business of moneylending*, whether or not he carries on any other business;

(b) over the years, the case law has developed to the effect that in the context of the Moneylenders Act, the word 'moneylender' therefore has a special statutory meaning as defined in the Act and it does not mean any person who is a lender of a sum of money. A 'moneylender' within the meaning of the Act is a person who *carries on or advertises or announces himself or holds himself out in any way as carrying on the business of moneylending*, whether or not he carries on any other business and the loan(s) he provides to a borrower is an interest-bearing loan. It is to be noted that a person can have several callings or businesses at the same time and that to constitute 'moneylending' by a person, the business of moneylending does not have to be the sole or principal calling or business activities of the person, as confirmed by the use of the expression 'whether or not he carries on any other business' in the s 2 definition. Section 2 of the Act defines 'interest' to include 'any amount by whatsoever name called in excess of the principal paid or payable to a moneylender in consideration

of or otherwise in respect of a loan';

(c) in the case of *Edgelow v MacElwee* [1918] 1 KB 205 on the construction of English Moneylenders Act of 1900 , the court held:

> The Money-lenders Act, 1900, precludes an unregistered moneylender from enforcing any contract made in the course of his money-lending business: see *Bonnard v Dott* (1); In *Re Robinson's Settlement*. (2) S 6 of the Act defines a moneylender as follows: 'The expression 'moneylender' in this Act shall include every person whose business is that of money-lending, or who advertises or announces himself or holds himself out in any way as carrying on that business'. *A man does not become a moneylender by reason of occasional loans to relations, friends, or acquaintances, whether interest be charged or not. Charity and kindliness are not the bases of usury. Nor does a man become a money-lender merely because he may upon one or several isolated occasions lend money to a stranger. There must be more than occasional and disconnected loans.* There must be a business of moneylending, and *the word 'business' imports the notion of system, repetition, and continuity:* see *Newton v Pyke* (3), per Walton J; *Fagot v Fine* (4), per Bankes and Lush JJ; and Newman v Oughton (5), per Ridley and Avory JJ. *The line of demarcation cannot be defined with closeness or indicated by any specific formula. Each case must depend on its own peculiar features. It is ever a question of degree.* But if it appears that the transactions are sufficiently numerous to require the inference that a system and business of money-lending is carried on, then the requirements of the definition in s 6 of the Act of 1900 are fulfilled and the question arises whether the case falls within the exceptions indicated in that section ... On the one hand a legitimate business must not be checked if the lending of money is reasonably and bona fide incidental to its successful prosecution. On the other hand the law must not permit an apparently legitimate business to be made the mere clock and pretext for the unlawful trade of an unregistered money-lender. Evasion of the Moneylenders Act should be repressed, and judges, I think, should be astute to recognize the possibilities of ingenious subterfuge and subtle device ... A man may follow concurrent callings. If one of such callings be the trade of a moneylender, then the Act must be complied with. (Emphasis added.)

(d) the notion of a degree of system, continuity and repetition were applied in Malaysia in connection with our Moneylenders Act 1951. For example, the Federal Court in *Ngui Mui Khin & Anor vS Gillespie Bros & Co Ltd* [1980] 2 MLJ 9 ; [1979) 1 LNS 60 held as follows:

> At the outset we wish to observe that the Moneylenders Ordinance 1951 does not apply to moneylending but only to moneylenders. It does not make every moneylending transaction illegal and unenforceable. It is only a moneylending transaction of a moneylender which is the subject-matter of the Ordinance and must comply with its provisions on pain of being declared illegal and unenforceable by the court. We make this simple and obvious observation because it was canvassed very strongly before us by counsel for the appellants that since the transactions between the respondents and the client are moneylending transactions, the respondents must be a

A moneylender and the guarantee which the appellants signed is therefore unenforceable. This submission overlooks *the fact that the party to a transaction who thereby becomes the creditor may or may not be a moneylender.* He is a moneylender if within the meaning of s 2 of the Ordinance he can be said to be a person 'whose business is that of moneylending'. *To prove business* B *requires some sort of continuity or system or repetition of similar transactions*. (*Chow Yoong Hong v Choong Fah Rubber Manufactory* [1962] AC 209 at p 218 [1962] MLJ 74). (Emphasis added.)

As explained in *Edgelow v MacElwee*, 'The line of demarcation cannot C be defined with closeness or indicated by any specific formula. Each case must depend on its own peculiar features. It is ever a question of degree'.

[59] In our present case, the evidence shows that the monetary transaction D between the plaintiff and the defendant was the only isolated transaction of such kind between them. There is no evidence that the plaintiff was a 'person who *carries on or advertises or announces himself or holds himself out in any way as carrying on the business of moneylending'.* On the contrary, there is an express clause in the agreement here that the plaintiff was not in the business of E moneylending: see cl 1.01 of the agreement in AB1/5.

[60] A statutory presumption which the defendants-borrowers often resort to is s 10OA of the Moneylenders Act which provides as follows:

F 10OA Presumption as to the business of moneylending

Where in any proceedings against any person, it is alleged that such person is a moneylender, the proof of a single loan at interest made by such person shall raise a presumption that such person is carrying on the business of moneylending, until the contrary is proved.

G

[61] In our present case, the plaintiff as the fund-provider took the risk of total loss of the money as well as the risk of reduction in the amount of money to be returned to him: see paras 16, 23 and 24 above. Interest on loan is a guaranteed amount or rate of extra return over and above the original principal H amount irrespective of how the borrower uses the money and irrespective of the outcome of the borrower's utilisation of the principal money. In our present case, apart from taking the risks of total loss or partial reduction of the principal money, the plaintiff also take the risk and uncertainty of contingency of repayment being dependent upon the viability and profitability of the business I venture of REB and the contingency of declaration of dividends. In the entire circumstances of the present case, there is no interest payable on the amount of principal money provided.

[62] In the premises this court holds that the presumption in s 10OA of the

Moneylenders Act 1951 is not applicable to the facts of the present case.

[63] The defendant in our present case has not proven the elements of moneylending here.

[64] Even if the statutory presumption were assumed to be applicable here, this court finds that the presumption has been rebutted in light of the express terms of the agreement and the evidence adduced in the present case. See paras 16–26 above.

[65] Moreover, in terms of procedure, this defence should not be allowed for the following reasons:

(a) this was never put to any of the plaintiff witnesses during cross examination by the defendant's counsel; and

(b) the defendant also in his witness statement did not allude to the fact that the said agreement contravenes the Moneylenders Act 1951. He only says that the agreement is illegal but does not state how or why.

[66] In the premises, this court holds that the monetary transaction between the plaintiff and the defendant here is not an illegal moneylending transaction.

[67] In the premises this court rejects the defendant's argument regarding the alleged illegality of this monetary transaction between the plaintiff and the defendant contained in the said agreement.

SUMMING-UP OF THIS COURT'S DECISIONS ON THE FOUR MAIN ISSUES

[68] To sum up, this court's decision on the four main issues are as follows:

(a) the agreement signed by the parties was a hybrid type of agreement for loan coupled with elements of business venture;

(b) the obligation to repay the monies by the defendant under the agreement has arisen, and therefore the plaintiff's suit is not premature;

(c) the defendant breached the above obligation to repay the monies; and

(d) the agreement is not an illegal moneylending transaction.

AMOUNT OF 5.86% OF DIVIDENDS

[69] Although the evidence shows that there appeared to be two tranches of sale proceeds in 2017 and 2018 which were not adequately explained, the plaintiff's witnesses did not testify as to whether and how the two tranches of

A sale proceeds could impact on the amount of dividends that could be declared by REH. The plaintiff's counsel also did not press the defendant regarding whether and how the two tranches of sale proceeds could impact on the amount of dividends that could be declared by REH.

B **[70]** In the circumstances this court shall only assess the amount of the plaintiff's 5.86% dividends based on the audited financial statements and the evidence adduced by the witnesses without taking into account the possible impact of the first two tranches of sale proceeds.

C **[71]** As at 31 July 2019, there was retained profits or RM12,747,525 in REH (AB3/90). The fair value of REH's investment in REB, the SPAC, was RM39,608,752 as compared with the total liabilities of RM26,168,648 (AB3/90). In the circumstances, this court agrees with PW2 Nur Ain's evidence
D that the dividends could have been properly declared by REH. The total liabilities of RM26,168,648 was incurred by REH as a result of REH buying instead of selling shares and warrants in REB in contravention of the intent of the said agreement. Despite such contravention, REH still had distributable retained profits in 2019.

E **[72]** This court finds that in the circumstances REH as a company, if it were to be acting under the diligent and reasonable efforts of the defendant as its CEO after the lapse of the moratorium, could have sold its shares in REB (the SPAC) in such manner as to be able to declare not less than RM10m as
F dividends in the second half of 2019 by selling its balance shares in REH and using the sale proceeds to declare as dividends.

[73] In the agreement between the plaintiff and the defendant, the
G defendant was under obligation to pass on to the plaintiff 5.86% of the total dividends of REH, ie 5.86% of RM10,000,000 = 0.0586 x RM10,000,000 = RM586,000.

[74] In cross-examination on 11 August 2022 DW1 the defendant stated
H that the amount he received from the plaintiff was used to subscribe 15,000,000 shares and 15,000,000 warrants in REB. Bearing in mind that the average sale price of REB shares in 2019 and 2020 was about RM0.30 per share (see AB1/40, 42, 44; WS-PW1 Q&A 8) and that REB has been a purely investment holding company, this court finds it rather conservative to order the
I defendant to pay the plaintiff the original sum of RM1,125,000 plus the plaintiff's share of dividend of RM586,000. The sum total of the sale proceeds from the sale of the 15m shares and 15m warrants in REB in 2019 is very much more than the sum total of these two amounts awarded here.

INTEREST ON JUDGMENT SUM

[75] In the writ and statement of claim, the plaintiff has claimed for interest on judgment sum at 5%pa from 1 July 2019 until the date of full realisation.

[76] In the considered view of this court, the 5%pa interest on the judgment sum should start from 20 April 2021, the date of filing of this suit.

CONCLUSION

[77] Wherefore, this court has ordered as follows:

(a) the defendant shall forthwith repay the plaintiff an amount of RM1,125,000;

(b) the defendant shall forthwith pay the plaintiff an amount of RM586,000 as the plaintiff 5.86% share of the dividends;

(c) the amounts in items (a) and (b) above shall carry interests at the rate of 5%pa from 20 April 2021 until the date of full realisation; and

(d) the defendant shall pay to the plaintiff the costs of this action assessed and taxed at RM40,000, subject to allocatur.

Claim allowed with costs.

Reported by Nabilah Syahida Abdullah Salleh